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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 112

RED CROSS LINE

Petitioner,

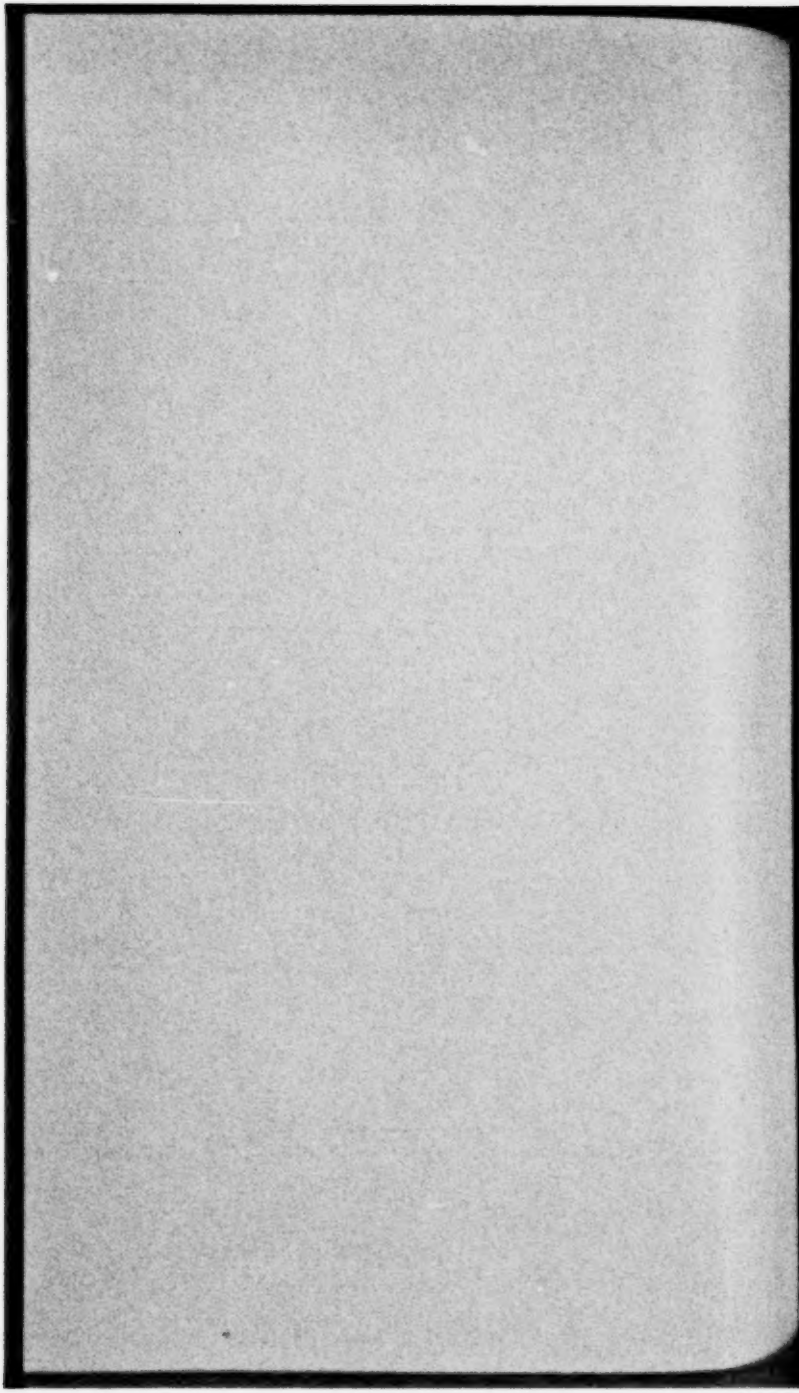
AGAINST

ATLANTIC FRUIT COMPANY,

Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

HOMER L. LOOMIS,
Counsel for Petitioner.



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Supreme Court of the United States

RED CROSS LINE,
Petitioner,

AGAINST

ATLANTIC FRUIT COMPANY,
Respondent.

Statement of the Case.

This case comes to this Court on a writ of certiorari issued by this Court on December 2, 1922, to review an order and judgment of the Supreme Court of the State of New York, County of New York, dated respectively June 5, 1922, and July 26, 1922, (pp. 33 and 34)* and entered on an order and judgment of the Court of Appeals of the State of New York (p. 32) reversing an order and judgment of the Appellate Division of the Supreme Court of the State of New York (pp. 30, 31). This latter order and judgment had affirmed an order of the Supreme Court, New York County, directing the respondent, At-

*All references noted herein, unless otherwise described, relate to the Transcript of Record filed in this Court.

lantic Fruit Company, to proceed to arbitration as it had theretofore by contract agreed to do (pp. 1, 2).

STATEMENT OF FACTS.

Provisions of Arbitration Statute and History of Petition for Arbitration.

In April, 1920, the Legislature of the State of New York by Chapter 275 of the Laws of 1920 enacted a law hereinafter referred to as the Arbitration Statute. In Section 2 of said statute it is declared that agreements to arbitrate "shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law and equity for the revocation of any contract." In Section 3 a method is provided whereby to facilitate the specific performance of such agreements. A copy of the Arbitration Statute as amended by the laws of 1921 appears as an appendix to this brief (*infra*, pp. 53-61).*

On or about May 27, 1920, the petitioner, Red Cross Line, a British corporation, pursuant to said statute, filed a petition in the Supreme Court, New York County, praying for an order directing the respondent herein, Atlantic Fruit Company, a Delaware corporation, to join with petitioner in an arbitration in accordance with an arbitration agreement contained in a charter party executed in New York to which they were parties and under which a controversy had arisen.

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*A copy of this statute is also to be found attached to the Petition on which the Writ of Certiorari herein was granted.

Prior to a hearing had on said petition, however, the Appellate Division of said Supreme Court held that the said arbitration statute was not applicable to agreements executed prior to the enactment of the statute. Inasmuch as petitioner's agreement had been executed prior to the enactment of the arbitration statute petitioner withdrew and held in abeyance its petition pending the decision of this question by the Court of Appeals of the State of New York. Thereafter the said Court of Appeals reversed the holding of the said Appellate Division and thereupon the petitioner on April 12, 1921, filed its petition anew (pp. 3-12).

Allegations of Petition to Enforce Arbitration.

Briefly stated the petition set forth (pp. 3-6):

That on November 28, 1919, respondent had chartered to petitioner the steamship *Runa* for one round trip between New York and a safe Atlantic port in British North America at a hire of $25,000.00 per month; that among other provisions in said contract it was provided that the captain should prosecute the voyage with the utmost dispatch, that in the event of damages preventing the working of the steamer for 24 hours at sea payment of hire should cease until the vessel was again in an efficient condition to resume her journey and that any loss of time occasioned by repairs to hulls or machinery or by deficiency of crew or stores, should be for respondent's account; that it was further provided by Article 23 of said contract as follows (p. 29, fol. 69):

"23. That should any dispute arise between owners and charterers the matter in

dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto and the third by the two so chosen; their decision or that of any two of them shall be final and for the purpose of enforcing any award this agreement shall be made a rule of the court."

That thereafter the said steamship entered upon the performance of said contract and on December 6th cleared the port of New York bound for St. Johns, Newfoundland; that the captain did not prosecute the voyage with the utmost dispatch; that when within 100 miles of his destination, the master turned the steamer around and went into the Azores where she was laid up for 21 days, thereby consuming 39 days in the trip made to St. Johns instead of the 8 days ordinarily required; that petitioner, being in ignorance of the true facts until the return of the steamer to New York and in order to prevent her premature withdrawal for non-payment of hire and otherwise to protect its rights, paid to respondent under protest hire and disbursements at the times and in the amounts stipulated in the contract; that by reason of these facts petitioner had overpaid to respondent hire and disbursements in the sum of $35,256.96, of which sum petitioner demanded the repayment; that respondent had refused and disputed its liability to repay the same; that a dispute having thus arisen petitioner pursuant to said Article 23 called upon respondent to arbitrate the same; and that respondent had refused and still refuses to arbitrate.

The petition concluded with a prayer for the relief hereinbefore described.

Removal to Federal Court and Remand.

After petitioner had served and filed its petition in the State Court respondent removed the same to the United States District Court for the Southern District of New York on the ground that it was a civil suit between an alien and a non-resident wherein the amount in controversy was over $3,000 and on the further ground that it was a suit arising under the constitution or laws of the United States (pp. 18-19). Petitioner appearing specially in the District Court moved to remand the suit to the State Court and respondent made a counter motion to dismiss the same for lack of jurisdiction. The District Court denied the motion to dismiss and remanded the suit (p. 22) on the ground that it was not a suit in which the jurisdictional amount of $3,000.00, as required by the removal statute, was involved. *In Re Red Cross Line*, 277 Fed. Rep. 853.

Theory of Respondent's Defense.

The respondent thereafter filed an answer to the petition in the State Court (pp. 12-16) in which, among other things, it admitted the agreement to arbitrate and that it had refused so to do. Respondent alleged, however, as a complete defense, that the dispute set forth in the petition, being one arising out of a charter-party, was a maritime dispute and a cause over which the Admiralty Court has exclusive jurisdiction, except in so far as a common law remedy is saved; that the State Statute "provided (to quote respondent's language, p. 14, fol. 30) an

additional remedy unknown to the common law for the settlement or adjustment of disputes by compelling parties to arbitrate them if they have agreed to do so"; and that, in so far as the statute was intended to apply to agreements to arbitrate disputes arising over matters within the maritime jurisdiction, said statute was contrary to Article III, Section 2, of the Federal Constitution and Sections 24 and 256 of the Judicial Code conferring jurisdiction over such disputes on the Admiralty Court.

Thereafter a hearing was had on said petition before Mr. Justice Burr at a Special Term of the Supreme Court of the State of New York, who subsequently handed down a memorandum opinion (p. 22, fols. 57-58) granting the petition and entered the order heretofore referred to directing respondent to proceed to arbitration in accordance with its contract (pp. 1-2). From said order an appeal was thereafter carried to the Appellate Division of the Supreme Court, First Department, where without opinion the order was unanimously affirmed.

Thereafter on appeal carried to the Court of Appeals of the State of New York, the order of the Appellate Division was reversed and the proceedings were ordered to be dismissed.

Opinion of State Court of Appeals.

The Court of Appeals in the opinion accompanying the order of reversal and the dismissal of the proceedings reasoned in brief (pp. 36-40), that, the charter-party agreement, in which the arbitration agreement was incorporated, being one for the use of a steamship and the trans-

portation of cargo from the port of New York to a foreign port, and the controversy being one pertaining to navigation, "the question of liability or non-liability of the owner to the charterer is within the exclusive jurisdiction of the courts of admiralty" and to use the remedy provided by the statute to enforce specifically the arbitration agreement would be an idle proceeding because the arbitrators could not assume jurisdiction of a maritime controversy (p. 40, fol. 97); and that "to sustain the arbitration agreement and enforce the same in the state court would deny to the federal court the exclusive jurisdiction with which Congress had clothed it and likewise destroy a rule of uniformity."

Statement of Question Involved.

The question, therefore, in brief presented to this court for review and determination is as follows: Is a State statute that provides for use in the courts of that state a method specifically to enforce arbitration agreements unconstitutional, as an infringement of the maritime jurisdiction, when applied to an arbitration agreement contained in a charter-party where the controversies to be arbitrated arise subsequent to the making of the agreement and are such as are cognizable in an Admiralty Court?

Reasons Why Decision of State Court of Appeals is Erroneous.

The decision of this question in the affirmative by the Court of Appeals, it is submitted, is erroneous and unwarranted, whether the State remedy be considered (1) a remedy to enforce only the specific agreement to arbitrate or (2) a remedy to enforce the ultimate rights asserted in the controversy.

If the first of these two alternatives be true the State remedy enforces an agreement that is collateral to and independent of the other obligations of the charter-party and is itself non-maritime in nature. Its enforcement by the state court would not deny to the Federal admiralty court its exclusive jurisdiction merely because such enforcement would result in the adjustment of maritime disputes without the admiralty court. And even were the agreement to arbitrate to be treated as maritime its specific performance pursuant to the decree of an equity court would not infringe the admiralty jurisdiction, which lacks the power to compel such performance.

On the other hand, to consider the second of the alternatives above noted, if the remedy, although in terms one to enforce the agreement to arbitrate is, as respondent contended, one provided to enforce the ultimate rights asserted in the controversy, it is not a remedy that infringes the exclusive jurisdiction of the admiralty court because in that event the suit in which the remedy is invoked is a common law suit *in personam* for damages for breach of contract in which the court by a mere auxiliary process authorized by the state statute enforces

an agreement that the merits of the controversy and the amount of damages in such suit shall be conditioned upon the report of arbitrators as upon any other extrinsic fact which agreement might prescribe. A judgment *in personam* is entered upon this report and the proceeding is therefore "essentially a proceeding according to the course of the common law" and within the saving clause of the judicial code, saving to suitors a common law remedy for a maritime cause.

Assignments of Error.

The petitioner in its application made to this Court for the Writ of Certiorari granted herein assigned the following errors on the part of the State Court of Appeals:

1. The Court of Appeals of the State of New York erred in holding that to enforce in the state courts the parties' agreement to arbitrate contained in a charter-party would deny to the Federal courts the exclusive jurisdiction with which Congress had clothed them.

2. The Court of Appeals of the State of New York erred in holding that because the subject of the controversy existing between the parties is one pertaining to navigation, therefore the question of liability or non-liability of the vessel's chartered owner is within the exclusive jurisdiction of the Court of Admiralty.

3. The Court of Appeals erred in holding that to enforce the arbitration agreement in the State Court would "destroy a rule of uniformity."

ARGUMENT.

POINT I.

The statutory remedy being one for the enforcement of a non-maritime contract, its application in the State Court does not deny to the Federal Courts their exclusive jurisdiction. And even if the arbitration clause of a charter-party should be considered of a maritime nature, the foregoing proposition is equally true both because of the Admiralty's admitted want of equity jurisdiction and because of the well settled concurrent jurisdiction of the Courts of common law.

A.—The agreement to arbitrate alone is the subject of the statutory remedy.

Petitioner brought its petition for the specific performance of the arbitration agreement in the equity part of the Supreme Court, New York County, invoking for that purpose the quick and efficient procedure provided in the Arbitration Statute. Section 3 of the statute provides in terms a "remedy" for the "party aggrieved" to enforce "a contract or submission providing for arbitration" on the "failure, neglect or refusal of another to perform".

In so far as there has been any judicial interpretation of Section 3 of said statute, it is consonant with the *expressed* intent of the act. It has been judicially declared not only that the said section "*prescribed the procedure for the enforcement of the contract*"* (*Matter of Berko-*

*All italics appearing herein unless otherwise noted are the writer's.

witz v. *Arbib & Houlberg*, 230 N. Y. 261, 269) but also that the "*act is intended to compel specific performance of contracts for arbitration*" and in the absence of such a contract it provides no remedy whatever (*Matter of Division, 132 etc.*, 196 App. Div. 206, 212).

The courts have never denied that the agreement to arbitrate created a right. In *Matter of Berkowitz* v. *Arbib & Houlberg*, (*supra*), the suggestion was made that prior to the enactment of the Statute such an agreement did not create a right but the court held this view to be erroneous and said at page 271:

> "Public policy was thought to forbid that the promise *be specifically performed.* Public policy *did not forbid an award of damages if it was broken* (*Haggert* v. *Morgan*, 5 N. Y. 422, 427; *Finucane Co.* v. *Board of Education*, 190 N. Y. 76, 83)."

And as was pointed out by this Court in *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, at page 385, if the agreement to arbitrate is so phrased that it cannot be considered as a condition precedent to an action on the principal contract, it is "well settled that the agreement for submitting the amount to arbitrators is collateral and independent and * * * will support a separate action"; language clearly recognizing that the agreement created a substantive right.

In view of the express provision of the statute and the judicial declaration made in reference thereto to the effect that the remedy furnished is one to enforce the contractual right to arbitra-

tion, the application of the statutory remedy to the independent contract to arbitrate incorporated in a charter-party does not infringe the jurisdiction of the admiralty court; at least not unless this independent contract is maritime and subject to the admiralty jurisdiction.

B.—The agreement to arbitrate is not a maritime agreement and is not within the jurisdiction of the admiralty court.

The doctrine that the "essential requisite of a contract to bring it within the admiralty jurisdiction" and the "true criterion" for its determination is "an undertaking for the performance of maritime services" has been so often laid down that it must now be treated as settled. (*North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 125; *Peoples Ferry Co. etc.* v. *Beers et al.*, 61 U. S. 393, 401; *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 392; *The Perseverance*, Blatchf. & H. 385, 19 Fed. Cas. 307, 308; *Pacific Surety Co.* v. *Leatham etc. Co.*, 151 Fed. 440, 442-443; *Amer. & Eng. Encyc. of Law*, Vol. I, p. 660 and cases cited.)

It is obvious that a purely personal stipulation to join in the appointment of arbitrators in New York and to submit to them controversies for determination does not come within the narrow confines of this rule. The subject matter of this covenant relating as it does to the submission of controversies to arbitrators "neither involves maritime services nor maritime transactions".

The fact that the arbitration agreement is included in a charter-party does not alter the na-

ture of the act or acts agreed to be done. A charter-party, while it is characterized generally as a maritime contract, is to speak more accurately a series of agreements, some of which very often have no relation to a maritime service and are unenforceable in an admiralty court. The agreement to arbitrate is obviously entirely independent of and unrelated to the other covenants in the charter-party. It is like the clause contained in the charter-party herein and numbered 26 (p. 29, f. 69) and regularly found in all charter-parties stipulating the commission to be paid to the broker effecting the charter; surrounded by covenants of a maritime nature but itself not maritime and therefore not enforceable in an admiralty court.

Brown v. *West Hartlepool Steam Nav. Co.*, 112 Fed. Rep. 1018;
Richard v. *Holman*, 123 Fed. Rep. 734, 736-737;
Richard v. *Hogarth*, 94 Fed. Rep. 684;
Taylor v. *Weir*, 110 Fed. Rep. 1005;
The Thames, 10 Fed. Rep. 848.

In *Plummer* v. *Webb*, 4 Mason, 380, 19 Fed. Cas. 891, Mr. Justice Story laid down the principle, approved by this Court in *Grant* v. *Poillon*, 61 U. S. 162, 168, that "a contract of a *special nature* is not cognizable in the admiralty merely because the consideration of the contract is maritime". In the first mentioned case Mr. Justice Story in refusing to assume jurisdiction in admiralty to enforce a covenant for "good tender and parental usage" in an otherwise maritime

contract pointed out, in so far as the agreement here under consideration is involved, the judicially accepted line between those contracts which are and those which are not enforceable in admiralty. He said at page 894 (19 Fed. Cas.):

> "I cannot say that the whole contract is here of a maritime nature. There is *mixed up in it obligations ex contractu not necessarily maritime;* and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved *some ingredients of a maritime nature.* The substance of the whole contract must be maritime. If the doctrine of the *courts of common law,* which denies admiralty jurisdiction over *mariners' contracts where there is a special agreement,* had been confined to cases where the consideration for such maritime services was not money but of a *peculiar nature not capable of adjustment in pecunia numerata,* or resting in *special executory stipulations,* there would have been little objection to it. See *Howe* v. *Napier,* 4 Burrows 1944; *De Lorio* v. *Bolt* (Case No. 3766); *Harden* v. *Gordon* (id. 6,047). If a contract were to convey a farm or a house, or to build a mill, or to furnish machines, or to weave cloth, *in consideration of maritime services,* it would hardly be contended that a court of admiralty had authority to *enforce these special stipulations.*"

It has accordingly been held that contracts of a special or personal nature incorporated in a charter-party or other contract normally maritime, even although capable of adjustment "in

pecunia numerata" are not subject to or enforceable in the admiralty but must be enforced if at all in the courts of common law.

> *The Ada* (C. C. A) 250 Fed. Rep. 194-195;
>
> *Pacific Surety Co.* v. *Leatham* (C. C. A.) 151 Fed. 440, at 442-43 and the cases there cited.

On any hypothesis no reason exists for holding an agreement to arbitrate to be maritime. Its enforcement no more calls for the application of any maritime principle than would a controversy as to fraud or mistake in its inception, where only the common law courts (as distinguished from the admiralty courts) could assume jurisdiction of the controversy or grant any relief in reference thereto.

For the foregoing reasons petitioner contended before the Court of Appeals that the enforcement of this agreement through the application of the state remedy did not deny to the admiralty court its exclusive jurisdiction; that petitioner was not there seeking the adjudication of the ultimate rights arising under the principal contract or the return of the overpaid charter hire, but the specific performance of a contractual right which made *available the agreed remedy* for that purpose, namely, *arbitration.* The Court did not deny the soundness of this contention, but in answering it said (Transcript of record, page 40):

> "Counsel for the charterers (petitioner) urges that a remedy provided in the state court *that makes available a remedy* for the

settlement of a maritime controversy through the specific performance of an agreement for that remedy is not an infringement of the jurisdiction of the admiralty court; that the charterers are not seeking a judgment for overpaid charter hire, etc., but an order decreeing that the arbitration proceed in the manner provided by the contract. Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract an order granting such relief presupposes the existence of a controversy the subject matter of which is within the jurisdiction of the court granting the order. It would be idle ceremony for the courts to grant an order requiring specific performance of an agreement to arbitrate a dispute where upon an examination of the papers presented as the basis for such an order it is apparent that the subject matter of the controversy which the charterers desire submitted to arbitration clearly arose under maritime clauses in a charter party over which the arbitrators could not assume jurisdiction even if arbitration was ordered."

Inasmuch as it would seem that the court assumed that petitioner was not seeking a judgment for the return of the alleged overpaid charter hire there was, of course, no controversy before it as to the "liability or non-liability of the owner to the charterer". The remedy sought being one to enforce the arbitration agreement, the only possible controversies that could arise over its enforcement, with the exception of the one as to constitutionality, would be whether the agreement was made and, if made, valid, and if valid whether it was broad enough to cover the

disputes that had arisen. All of these controversies are unquestionably within the jurisdiction of the state court. That these are the only questions before the court and that they are questions over which it has jurisdiction was declared in *Matter of Berkowitz* v. *Arbib & Houlberg, supra.* In that case the arbitration statute was assailed as "abridging the general jurisdiction of the Supreme Court". In holding this contention unsound the court said in part at p. 274:

> "The Supreme Court does not lose a power inherent in its very being when it loses power to aid in the repudiation of a contract concluded without fraud or error, whereby differences are to be settled *without resort to litigation.* For the right to nullify is substituted *the duty to enforce.* Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, as upon any other extrinsic fact, which agreement might prescribe. *Whether they have so contracted is a question which the court must still determine for itself* * * * *If the contract has not been made or is invalid the court* will proceed as in any other case to *a determination of the merits.*"

If it be assumed that the court's inference as to its lack of jurisdiction arose from its acceptance of a theory put forward by the respondent that the agreement to arbitrate is maritime because it is included in a charter-party and the controversies to be arbitrated are maritime, then we submit that, for the reasons pointed out above, the court's conclusion is clearly erroneous.

If the subject-matter of the agreement to arbitrate is the subject-matter of the various and varying controversies that may thereafter arise by reason of the asserted breach of other covenants of the principal contract, the measure of damages for the breach of the arbitration agreement in an action at law would not be the loss resulting from the breach of that agreement but rather the loss suffered by reason of the alleged breach of the other covenants of the contract; an obvious absurdity.

The case of *Munson* v. *Straits of Dover Steamship Company*, 99 Fed. 787, cited by respondent in its answer to the petition for the writ of certiorari herein as authority for the contention that the arbitration agreement is maritime, is without force. The question was neither raised by counsel nor considered by the court. As a matter of fact the suit was dismissed as not sustainable in admiralty because the damages for the breach of the arbitration agreement are only nominal. The fact that a suit may be dismissed for one reason does not of course exclude the existence of other reasons that would justify a dismissal.

C.—But even if the agreement to arbitrate should be considered maritime, the equity court has jurisdiction to compel its specific performance.

The principle is of course well settled that courts of admiralty have no general jurisdiction to administer relief as courts of equity, and cannot compel specific performance. That fact,

however, does not deprive the equity courts of their power to decree it in a proper case whether maritime or otherwise. *The Eclipse*, 135 U. S. 599, 608; *Andrews* v. *Essex Ins. Co.*, 3 Mason 6, 1 Fed. Cas. 885, 888; *Meyer* v. *Pacific Mail S. S. Co.*, 58 Fed 923; *Dean* v. *Bates*, 2 Woodb. & M. 87, 7 Fed. Cas. 299, 300; *Kynock* v. *S. C. Ives*, Newb. 205, 14 Fed. Cas. 888, 891.

The rule is concisely stated in the last cited case at p. 891, as follows:

> "Courts of admiralty have no general jurisdiction to administer relief as courts of equity. *If a maritime contract is broken* the admiralty concurrent with courts of law can only give damages for the breach of it, *whereas the chancery may compel the party in some cases to specific performance.*
>
> *A court of admiralty has no more power to decree such specific performance than* it has to set aside a contract for fraud or correct a mistake or decree the execution of a trust. *These are matters properly* subject to the cognizance of courts of equity."

As we have previously pointed out the courts have never denied that the arbitration covenant created a right. Its value, however, is one of convenience to which no pecuniary value can be assigned. (*In Re Red Cross Line*, 277 Fed. Rep. 853.) Because its economic and convenience value cannot be pecuniarily determined and the *damages* for its breach are therefore nominal, specific performance is the only adequate remedy. "Jurisdiction exists that rights may be maintained". We may assume that jurisdiction is lodged in the admiralty court for no other purpose. When jurisdiction is invoked as here, that a right may not be maintained, it is in-

voked to defeat the end and purpose for which jurisdiction exists. For these reasons we believe that the principle announced in *Steamboat Company* v. *Chase*, 16 Wall. 522, is as truly applicable to the facts in this case as to the facts in that one. In that case the admiralty jurisdiction was invoked to defeat the recovery of damages by an administrator through a state-created remedy for the death of his decedent occasioned by the negligence of the defendant on navigable waters. The Court there said at p. 530:

> "When no remedy exists for an injury in the admiralty courts the fact that such courts exist and exercise jurisdiction in other causes of action leaves the state court as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the constitution and had no existence in our jurisprudence."

D.—Settlement of maritime controversies by arbitration is not inhibited by the provision conferring jurisdiction of maritime causes on admiralty courts.

The concluding sentence of the extract from the opinion of the New York Court of Appeals in the case at bar as quoted above to the effect that the arbitrators could not assume jurisdiction to determine the liability or non-liability of the owner to the petitioner because the controversy arose under maritime clauses in a charter-party, is an unprecedented and we submit an unwarranted extension of the provisions conferring jurisdiction on the Admiralty Court, and, if sound, would under all circumstances effectually

bar the enforcement of an award made by arbitrators. No inhibition exists in the provisions conferring jurisdiction on the admiralty court against parties' settling maritime controversies through methods other than litigation had in that court. Clearly the "exclusive" jurisdiction exists *only* where there is *a litigation in court* of maritime controversies.

In this connection it is to be remembered as is pointed out in *Berry* v. *Donovan & Sons*, 120 Me. 457, 458-459, 115 Atlantic Rep. 250, at p. 251, "that the congress in its exception did not save to suitors a remedy in the common law courts but saved to them a common law remedy. (*The Moses Taylor*, 4 Wall. 411, 431.) The distinction is the difference between *an action* and *a remedy;* a remedy does not necessarily imply an action. *Knapp & Co.* v. *McCaffrey*, 177 U. S. 638. A remedy upon the authority of Bouvier is the means employed to enforce a right or redress an injury. Remedies are usually by action but by no means necessarily so." Arbitration while not an action was nevertheless a well known remedy at common law for the settlement of controversies. See 5 *Corpus Juris*, p. 16; 3 *Blackstone Commentaries*, p. 16; and *Bured* v. *Odem*, 9 Ala. 755, 766. It is submitted that the conclusion of the Court of Appeals that arbitrators cannot assume jurisdiction of a maritime dispute is clearly erroneous.

Furthermore if arbitrators do not have jurisdiction to determine the rights and liabilities in such disputes, their award in reference thereto would be void and unenforceable. The Admiralty Courts, like the common law courts, however, have always considered as valid, and

upheld, the awards made in such controversies. Indeed the Admiralty Courts have gone much further. In *Toledo Steamship Co.* v. *Zenith Transportation Company,* 184 Fed. Rep. 391 (C. C. A.) one of the parties to the arbitration agreement sought to avoid the effect of the agreement after a decision of liability had been made by the arbitrators but before damages had been awarded. The court however refused to entertain the plea that the arbitration had been a nullity and obliged the parties to rest content with the relief thereby afforded. And no cause could have been more maritime than the one there involved for it was a case growing out of the collision of two ships on navigable waters.

Whether a court intervenes to decree the specific performance of the agreement or it is carried out without its intervention, the jurisdiction of the arbitrators, that is the power to hear and determine, results from the agreement of the parties, not from the mandate of the court, and hence it would seem that their *jurisdiction* is as valid in the one case as in the other.

E.—The state court in enforcing an agreement does not deny to the admiralty court its exclusive jurisdiction merely because by reason of such enforcement a forum other than the admiralty may determine the event and measure of damages for the breach of a maritime contract.

The fact that a forum other than the admiralty may be called upon to determine the *event* and *measure of damages* for the *breach of maritime covenants* has never been held to be an objection to the enforcement of a con-

tract in the state court. Indeed the direct opposite was inferentially held in *Pacific Surety Co.* v. *Leatham &c.* (C. C. A.) 141 Fed. 440. In that case a charter-party contained covenants substantially similar to the one involved herein. It also recited that a bond should be furnished for the performance of these covenants. The bond was furnished and subsequently the bonding company was proceeded against by libel in the admiralty court for the alleged breach of the covenants. A decree was entered against the bonding company, which on appeal was reversed and the libel dismissed for want of jurisdiction. In holding that a suit on the bond for the breach of the terms of the charter-party could not be maintained in the admiralty court the Court said in part at page 443:

> "True the obligation of the surety hinges upon the breach of a contract (maritime) on the part of the principal, and the charter-party is thus brought in by way of evidence of the breach, and of liability to respond in damages under the covenants of the bond. *The direct subject-matter of the suit is the covenant to pay such damages, which neither involves maritime services nor maritime transactions; and we are of the opinion that the mere fact that the event and measure of liability are referable to the charter-party* does not make the bond a maritime agreement nor its obligations maritime in the jurisdiction sense."

Surely if the admiralty court has no jurisdiction to enforce such an agreement, it cannot be reasonably contended that the state court may

not do so merely because by reason of its enforcement the question of liability or non-liability under the charter-party will be determined by a forum other than the admiralty.

That a party by contract may waive not only his rights under the maritime law, but also the right to resort to the admiralty court for the adjustment of his disputes it seems to us was in effect determined by this Court in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 478.

We do not believe that it is the policy of the law to compel parties *to litigate disputes* maritime or otherwise. This was the conclusion of the Supreme Court of Oregon in the recent case of *West* v. *Kozer*, 104 Ore. 94, 99-100, 206 Pacific Reporter, 542. In that case the court held that the provisions of the Oregon Workmen's Compensation law governed as to the recovery of damages for a maritime tort where the parties in effect had voluntarily adopted that law as a part of their contract. The court while basing its determination to a large extent upon the expression of this Court in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 478, was unable to find in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, any objection to the enforcement of an *agreement* substituting other rights and remedies for those furnished by the admiralty court. Speaking of the latter case the court said at pp. 99-100:

> "The Supreme Court of the United States held in substance that it was not competent for Congress to substract from the admiralty jurisdiction conferred by the Constitution
> * * *.

> We do not understand the Court as holding that an employer and employee may not *as between themselves* contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident and *preclude the necessity of litigation in the federal courts* * * *.
>
> It is not the policy of the law international or otherwise *to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out* * * *."

Arbitration is a quick economic and commonsense method of settling controversies without resorting to wasteful litigation. And as we have pointed out it is an ancient *common law* method of determining rights and redressing wrongs. There is no valid reason why parties should not settle their controversies, maritime or non-maritime, in this manner. Neither is there any reason why their agreement to do so should not be enforced.

F.—So-called Public Policy rule not to be extended.

We do not believe that this Court will, at the instance of a party confessedly seeking to avoid its contract to arbitrate, sanction the extension of the ancient policy that was thought to forbid the specific performance of such an agreement so as to prevent that result in the forum of a state, when that state by legislative enactment has repudiated the existence of such a policy. That the admiralty court cannot enforce such an agreement is not germane to the point. The

supposed policy itself is one of the common law; not of the admiralty. It has been followed in the admiralty as in the state courts in deference to early precedent, although with freqeunt protest. (*U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006; *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed. Rep. 319.) As was well said by the court in *Matter of Berkowitz* v. *Arbib & Houlberg* (*supra*) at p. 276:

> "The ancient rule, with its exceptions and refinements was criticized by many judges as anomalous and unjust (*D. & H. C. Co.* v. *Pa. Coal Co.* (*supra*); *Fudeckor* v. *Guardian Mutual Life Ins. Co.*, 62 N. Y. 392, 399; *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, and cases there cited). It was followed with frequent protest in deference to early precedent. Its hold even upon the common law was hesitating and feeble."

To hold that this old policy is of such potent force that it prevents the enforcement of an arbitration agreement in a jurisdiction that has repudiated the policy, simply because it may be said still to exist in a court that has concurrent jurisdiction of the controversies agreed to be arbitrated, is, we submit, unnecessary and uncalled for.

The old rule that prevented the enforcement of the agreement on the theory that it was against public policy as an ouster of the jurisdiction of the court has now been repudiated and abandoned by the courts of England in which it originated. As was said by Lord Dunedin speaking for the court in *Atlantic Shipping & Trading*

Co. v. *Louis Dreyfus & Co.*, Lloyd's List Law Reports, Vol. 10, p. 707, a very recent case in the House of Lords, in which the antiquated policy was again invoked:

> "Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad as an ousting of the jurisdiction of the courts, but that position was finally abandoned in *Scott* v. *Avery* (1856) 5 H. L. C. 811. As I read that case it can no longer be said that the jurisdiction of the court is ousted by such an agreement; *on the contrary the jurisdiction of the court is invoked in order to enforce it;* and there is nothing wrong in persons' agreeing that their disputes should be decided by arbitration."

The rule was supposed to have had its inception in the jealousy of the courts of their jurisdiction. "A more unworthy genesis," as remarked by Judge Hough in *U. S. Asphalt Co.* v. *Trinidad etc.* (*supra*) "cannot be imagined".

Further the policy of the admiralty court is not petrified. As was said in the concurring opinion rendered in *Aktieselskabet Korn, etc.* v. *Rederiaktiebolaget, etc.*, 250 Fed. Rep. 935, at 939, "Whether the rule * * * can long survive historical and logical criticism" is doubtful. But even if it should be abandoned by the admiralty or if the Congress by legislative enactment should repudiate and abolish it, the admiralty court is still powerless specifically to enforce the agreement and this remedy must be sought in the equity court. And in view of the fact that specific performance is a remedy

belonging peculiarly to the equity courts, it is at least doubtful whether Congress could constitutionally extend the jurisdiction of the admiralty court so as to confer this power upon it.

G.—Effect of holding that arbitrators cannot assume jurisdiction of maritime disputes.

We believe that this Court may take judicial notice of the trend of legislation to abolish the old rule in this country. If the large class of disputes growing out of charter parties or other contracts principally maritime cannot be submitted to or determined by arbitrators the value of this legislation, especially in seaboard states, is greatly minimized, and a large and important part of the public will be denied the benefit of this legislation.

Furthermore contracts that in the main are non-maritime, often either contain covenants of a maritime nature or incorporate by reference charter-parties or ocean bills of lading. Common examples of this class of agreements are found in contracts for the sale of minerals and other commodities to be shipped abroad that so provide for ocean transportation. Other examples may be found in those contracts for the transportation to foreign ports of shipments originating inland, one through bill of lading being given to cover the transit by both rail and water. These contracts may and perhaps often do contain arbitration agreements similar to the one herein. The disputes growing out of such contracts may, of course, be maritime or non-maritime or both. Indeed the settlement of one of

two disputes may be dependent on the determination of another; one maritime, the other non-maritime. The legal problems arising from an attempt to define with accuracy those disputes arising under such contracts which would be subject to the arbitration clause, as involving no maritime question in their determination, would probably precipitate as much litigation as the agreement was designed to avoid. But such a result could not well be avoided if the decision of the New York Court of Appeals were to stand.

We do not believe that this court can find in the provisions conferring jurisdiction on the admiralty court either necessity or warrant justifying such a result. Considerations not only of principle and of justice but also of expediency would seem to demand that in those states enforcing it the arbitration clause should not be considered half-good and half-bad, effective as to one group of questions arising under the agreement containing it and inoperative as to another, but should be regarded rather as valid and enforceable in respect to any and all controversies growing out of the general agreement, whether maritime or non-maritime, just as any other clause therein capable of specific performance would be enforced by a Court of equity, regardless of the nature of the consideration or of the contract in which it was found.

POINT II.

The ultimate controversies between the parties herein are within the jurisdiction of the State Court and the remedy provided by the State Statute even considered as one for the settlement of such underlying disputes is a Common Law remedy within the Saving Clause.

Respondent's Contention.

The respondent contended in the state court that the statute created a new remedy for the redress of violations of the covenants in the principal contract and that petitioner was seeking in the state court the return of the overpaid charter hire. Respondent sought to justify this contention with a statement of the New York Court of Appeals found in the opinion rendered by it in *Matter of Berkowitz* v. *Arbib & Houlberg*, (*supra*) to the effect that *arbitration* is a *remedial procedure* and that the statute had made two remedies *available* to redress the violation of a contract where formerly there was one.

This same contention was made in the United States District Court after the suit had been removed to that court in order to sustain the allegation that the suit was one that involved a controversy in which the value of the matter in dispute was at least of the jurisdictional amount of $3,000.00. That court however in remanding the suit to the state court held that it was not one for the return of the overpaid charter hire, but one to enforce the agreement to arbitrate and inasmuch as that agreement had no determinable pecuniary value the jurisdictional

mount was not involved (*Re Red Cross Line*, 77 Fed. Rep. 853). In this connection the Court aid in part at page 856:

> "* * * The overpaid charter hire is not here the matter in dispute but solely the right to specific performance of the agreement to arbitrate. If the arbitration is ordered the function of the court so far as the proceeding instituted goes ceases."

The Court of Appeals did not rule specifically n this question. It did not, however, although ne opinion of the District Court was indirectly part of the record and incorporated in petioner's brief, deny that the conclusion of the 'ederal Court was correct. Instead, it accepted ne contention of petitioner to that effect as ointed out herein in Point I, but concluded that o enforce the agreement in the state court would eny to the admiralty court its exclusive jurisiction.

Even if the ultimate controversies between hc parties are the subject of the state remedy, he state remedy is the equivalent of a common aw remedy and is one that is saved to suitors.

The respondent urged in the state court of ppeals, as it urged in its brief filed in this court n answer to the petition for the writ of certiorari herein, that it is the controversies beween the parties and not the arbitration agreement that is the subject of the statutory remedy. Respondent's contention would seem to be, therefore, that the order directing arbitration and the proceedings to be had before the arbitrators is a mere part of an additional remedy provided

in the state court for the settlement of controversies had between parties. Even if we assume for the purpose of argument that this contention is true and that this was the theory upon which the Court of Appeals acted, the dismissal of the proceedings by that court was erroneous because on the basis of that assumption the proceeding amounts to nothing more than an ordinary suit for damages for a breach of contract in which the determination of liability and damages, by an agreement that the court enforces, is left to arbitrators. In other words, if the court assumed that from the time when the Supreme Court of the State took jurisdiction to enforce the arbitration agreement it retained it until the award was made a judgment and that the remedy sought was in fact one to recover the loss sustained by reason of the alleged breach of the covenants of the principal contract, it does not differ from any other remedy *in personam* except that the court enforces by an auxiliary process authorized by the state statute the agreement that the merits of the controversy and judgment thereon shall be conditioned upon the report of arbitrators just as without the statute the court might condition its judgment upon any other extrinsic fact that agreement had prescribed. The remedy provided by the statute is therefore, in that view of the matter, a common law remedy or one that is "equivalent thereto". It is "essentially a proceeding according to the course of the common law" as "distinguished from admiralty proceedings" and is a remedy saved to suitors by reason of the provision "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it".

The Court of Appeals, however, in its opinion in the case at bar after quoting the provisions conferring jurisdiction on the admiralty court and discussing the nature of the questions raised by the controversy, concludes (p. 39, fol. 96):

> "* * * the subject of the controversy existing between the parties is clearly one pertaining to navigation, consequently the *question of liability or non-liability of the owner to the charterer* is within the *exclusive* jurisdiction of the courts of admiralty."

We submit that the conclusion of the court as thus announced discloses clearly that it has misapprehended the effect of the provisions conferring jurisdiction of maritime causes on the admiralty court. The grant of judicial power in cases of admiralty and maritime jurisdiction has never been construed as excluding the jurisdiction of the common law courts over civil causes simply because the admiralty court has unquestionable jurisdiction over these causes. Mr. Justice Story in his Commentaries on the Constitution referring to the grant of admiralty jurisdiction wrote as follows:

> "The reasonable interpretation would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the states could have no right to create Courts of Admiralty as such, or to confer on their own courts the cognizance of

> such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law." 3 *Com. on Const.*, Sec. 1,006.

The effect, moreover, of the grant of jurisdiction in the clause "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it" has always been held to confer concurrent jurisdiction on the state courts to furnish a common law remedy in civil cases of maritime origin even if the jurisdiction had not existed before (*New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390; *Propeller Genesee Chief* v. *Fitzkirk*, 12 How. 443, 448; *The Belfast*, 7 Wall 622, 644; *Leon* v. *Galceran*, 11 Wall. 185, 187-188; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Insurance Co.* v. *Durham*, 11 Wall 1, 32; *Manchester* v. *Massachusetts*, 138 U. S. 262).

The jurisdiction of the state court being concurrent to this extent, the "*question of liability or non-liability*" in maritime controversies is of course not within the "*exclusive*" jurisdiction of the admiralty court. The question to be determined is not, therefore, as was stated by the Court of Appeals, "whether or not the controversy between the parties is one of admiralty or of state jurisdiction" (p. 39, fol. 95) but rather, in the event that the remedy in question

be considered one to redress the violation of the principal contract, whether that remedy falls within the saving clause, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. This determination calls for the construction of a federal statute in relation to the remedy in question and this court of course is no more bound by the determination of the state court to the effect that the remedy is not embraced within the saving clause than it would be if the state court had held the reverse.

It makes little difference therefore whether the State Court of Appeals meant what it said in the above quoted language or whether, assuming that the statutory remedy is one for the violation of the covenants in the principal contract, the court intended to decide only that the remedy is not within the saving clause. In either event the court would seem to be in error. And inasmuch as the only reference, if it may be considered a reference, in the opinion as to the effect of this clause is found in the short statement that the statutory remedy is not "embraced within the exceptions contained in the Judicial Code" (p. 40), citing *Matter of Berkowitz* (*supra*), a case in which the court was not interpreting or considering the saving clause, it is evident that the court gave little or no consideration to the meaning, history, or prior judicial construction of this clause.

Review of Cases Interpreting the "Saving Clause."

The earlier cases in which the courts were called upon to determine the meaning of the saving clause were cases in which state statutes had attempted to confer upon the state courts the peculiar remedy of *a proceeding in rem* for causes cognizable in the admiralty court either *in rem* or *in personam*. Such were the cases of *The Moses Taylor*, 4 Wall. 411; *Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Lottawana*, 21 Wall. 558; *The J. E. Rumble*, 148 U. S. 1; *The Glide*, 167 U. S. 606. In these cases it was pointed out that the violation of the exclusive jurisdiction of the admiralty resulted from the attempt to provide in the state court for maritime causes *a remedy peculiarly in the province of the admiralty court.*

The true limitation of state legislation in providing remedies for maritime causes is stated, impliedly at least, in *The Hine* v. *Trevor* (*supra*), as *such* remedies as would make the jurisdiction of the state court *concurrent* in all cases with that of the admiralty. As was said by the court in that case at pages 571 and 572, after pointing out that the remedy there in question was one "partaking of all the essential features of an admiralty proceeding *in rem*":

> "But it could not have been the intention of Congress, by the exception in that section, to give the suitor *all* such remedies as might *afterwards be enacted by State statutes*, for this would have enabled the States to make the jurisdiction of their courts *concur-*

> *rent* in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated."

In *The Lottawana* (*supra*), however, the court in delimiting the scope of state legislation in maritime matters went further and pointed out the true meaning of the expression "common law remedy" or the "equivalent thereto" by contrasting it with the remedy *in rem* and pointing out that the latter is "exclusively conferred upon the District Courts of the United States"; and that state legislation can neither exclude a maritime contract from the domain of admiralty jurisdiction nor confer admiralty jurisdiction upon the state courts so as to enable them to proceed *in rem*, but can only authorize the enforcement of maritime contracts "by common law remedies or *such remedies as are equivalent thereto.*"

In this connection the court said at page 580:

> "State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, *for it is a maritime contract*, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the State courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by *common law remedies, or such remedies as are equivalent thereto.*"

The first attempt however to crystallize by definition the dividing line between those proceedings which do and those which do not violate the exclusive jurisdiction of the admiralty is found in *Knapp Stout & Co.* v. *McCaffrey*, 177 U. S. 638. In that case McCaffrey had a half raft of lumber in his possession at Boston Bay, Illinois, which was part of a raftage that he had towed under a *concededly maritime contract* from Stillwater, Minnesota, to St. Louis. His towage charges being unpaid McCaffrey filed a bill in equity in the Illinois State Court to foreclose his lien, the *local law* allowing the enforcement of possessory liens in equity. A decree was entered in his favor for the sum of $3,643.17, which was affirmed by the Supreme Court of the State. This court in reviewing the determination of the state court stated in effect on page 644 that inasmuch as the proceeding taken was not a comon-law action, but a suit in equity, the real question before it was "whether the proceeding taken is within the exception 'of saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it'." The court then pointed out that the reservation was not of an action at common-law but of a common-law remedy; that a remedy does not necessarily imply an action; but that it is the means employed to enforce a right or redress an injury. The court concluded that the proceeding taken was therefore within the saving clause and laid down the principle in reference to the exclusive jurisdiction of the admiralty court on page 648 as follows:

"The *true distinction* between such *proceedings* as are and such as are not invasions of the *exclusive admiralty jurisdiction* is this: If the cause of action be cognizable in admiralty and the suit be *in rem* against the thing itself though a monition be also issued to the owner the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction or *if the suit be in personam against an individual defendant* with an auxiliary attachment against a particular thing or against the property of the defendant in general it is *essentially* a proceeding *according to the course of the common law* and within the saving clause * * *."

In *Leon* v. *Galceran,* 11 Wall. 185, it was held that a suit for wages on a mariner's contract in the State Court and the concurrent issuance of a writ of sequestration authorized by the Louisiana statute against a vessel as security to respond to a judgment if recovered against her owner, was not an invasion of the exclusive admiralty jurisdiction but that the suit was one *in personam* and within the saving clause. Likewise in *Rounds* v. *Cloveport Foundry,* 237 U. S. 303 the institution of a suit *in personam* in the state court on a maritime contract and the concurrent issuance therein of a process of attachment under the Kentucky Statute was held not to violate this exclusive jurisdiction.

Principle to be Drawn from Cases and its Application Herein.

It would seem clear therefore that, in a suit on a maritime contract against a *person* to recover a *money judgment*, the mere issuance of an auxiliary process, *authorized by a state statute* in *aid* of the suit is not an infringement of the exclusive jurisdiction of Admiralty, but is a suit *in personam* and within the saving clause.

It is to be noted that the cases above referred to are those in which *remedies only* were considered and likewise remedies for the enforcement only of rights and obligations created by a maritime contract or raised by the General Maritime Law. The principle to be drawn from them and also the correct interpretation of the saving clause is we believe accurately stated in *Corpus Juris*, Vol. 1, p. 1,253, as follows:

> "The clause saving to suitors a common law remedy where the common-law is competent to give it *is intended to save the remedy or right of action in those courts which proceed according to the course of the common-law as distinguished from Admiralty proceedings* and the words 'common-law remedy' do not necessarily imply an action or remedy in a common-law court *but are equivalent to the means employed to enforce a right or redress an injury.*"

See also to the same effect *Johnson* v. *Westerfield*, 143 Ky. 10, 14; and *Chase* v. *American Steamboat Co.*, 9 R. I. 419, aff'd. 16 Wall. 522.

The same rule though stated in somewhat different language was recently laid down in *The*

Kalfarli, 277 Fed. Rep. 391 (C. C. A.) 2nd Circuit. The court there said at page 394:

> "The right to proceed *in rem* is one which must be pursued in the admiralty courts; the right to proceed against the vessel *in rem* being *distinctly an admiralty remedy*, and as such exclusively within the jurisdiction of the admiralty courts of the United States. But the right to *proceed in personam against the shipowner on his contracts, money damages alone being demanded, has always been within the common-law courts which have a concurrent jurisdiction with the courts of admiralty in such cases. Benedict's Admiralty*, Sec. 127."

To apply these principles to the remedy here sought for, even if it be considered as one for the return of the overpaid charter hire, it is a remedy clearly within the scope of the saving clause. The proceeding is instituted by the service of process on a person; it is to redress the alleged breach of the covenants of the charter-party; it ends in an ordinary money judgment against a person, enforceable in the usual manner. It is one that obviously does not infringe the remedy that the courts have repeatedly said, in interpreting the provisions conferring jurisdiction, is "*exclusively* conferred upon the District Courts of the United States" and is one in "those courts which proceed according to the course of the common law *as distinguished from admiralty proceedings.*" It differs from an ordinary suit *in personam* only in that there is granted during the proceeding an interlocutory order authorized by the statute for the specific

performance of the agreement that judgment shall be conditioned upon the report of arbitrators. In other words, it is an ordinary action for damages for breach of contract, in which the court's judgment is to be predicated upon the report of arbitrators according to the parties' own agreement, which agreement is enforced like any other term of the contract.

That this is the only change effected by the application of the statute is in effect stated in the opinion in *Matter of Berkowitz, etc.* (*supra*). In that case, as we have pointed out above, the statute was assailed as abridging the general jurisdiction of the Supreme Court of the State. In answering this contention the court said in part at pages 275 and 276:

> "Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, *as upon any other extrinsic fact which agreement might prescribe.* Whether they have so contracted is a question which the court must still determine for itself. * * * If the contract has not been made or is invalid, the court will proceed, as in any other case, to a determination of the merits. If it has been made and is valid, the court will stay its hand till the extrinsic fact is ascertained, and the condition thus fulfilled * * *. 'In common language, where no attempt is made at logical accuracy,' it is sometimes said that the contract of arbitration 'ousts the jurisdiction' of the judges (*Wilson* v. *Glasgow Tramways & O. Co.*, 5 Session Cases (Scot., 4th Series, 981, 992). 'In strictness, however, it does not oust the jurisdiction, *but merely introduces a new plea*

> *into the cause'* on which the judge as at common law is under a duty to decide (*Wilson* v. *Glasgow Tramways & O. Co., supra*). The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted *to the convention of the parties restricting the media of proof.* Long before the statute there was a like withholding of relief whenever the subject-matter of arbitration, instead of extending to all differences, was limited to some (*Prest., etc., D. & H. C. Co.* v. *Pa. Coal Co.*, 50 N. Y. 250; *Scott* v. *Avery*, 5 H. L. 811; *Hamilton* v. *Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 255). There was a like refusal to permit the litigation of the merits when the contract though general, was no longer executory but had ripened into an award. *The change resulting from the statute is one of measure and degree.*"

We believe therefore that there can be no reasonable doubt that, even if the remedy provided by the statute may be considered to be one to redress a violation of the principal contract, the variation, effected by the enforcement of the arbitration agreement, of the ordinary procedure prevailing in an action for damages, is not such as would deprive it of the classification of a common law remedy or at least such a "remedy as is equivalent thereto."

We are not unmindful of the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, much relied upon and quoted from

by the respondent in the State Courts and in its brief filed in opposition to the petition for the writ of certiorari herein. The statement of the court in the *Jensen* case that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common-law incapable of enforcement by the ordinary *process of any court*" can have no application to the remedy here sought, even if considered as one to recover the overpaid charter hire. Aside from this fact, however, we believe that the Court's remarks are not to be considered apart from the statute that it then had under consideration. Not only did that statute create a remedy, as defined by the court above, but *ex proprio vigore* it *substituted statutory rights* and *liabilities*, for those recognized, and for which a remedy existed, in the admiralty court and made them enforceable exclusively by the remedy thus created. As stated by this Court in the *Knickerbocker* case, *supra*, "The state enactment prescribes *exclusive rights and liabilities*, undertakes to secure their observance by *heavy penalties* and *onerous conditions* and provides novel remedies incapable of enforcement by an admiralty court."

The statutes considered in *Union Fish Co.* v. *Erickson*, 248 U. S. 308 and *Watts* v. *Camors*, 115 U. S. 353, also referred to by respondent were objectionable for the same reasons as those pointed out in the *Jensen*, *Knickerbocker* and *Chelentis* cases but the principles announced have no application here. In *Watts* v. *Camors* the court refused to apply the law of Louisiana in the admiralty court because to do so would be to *substitute* for the well known measure of dam-

ages raised by the admiralty law for breach of contract the measure of damages provided by the state law. In *Union Fish Co.* v. *Erickson* the court refused to apply the state statute in an action in the admiralty court because it *abolished* a well recognized maritime contract.

The distinction is obvious between the statutes condemned in the foregoing cases and the one here under consideration, which merely makes *available* an old equity process in a suit brought in the State Court to enforce *contractual rights.*

Furthermore, as we read the case of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 478, this Court found no violation of the exclusive admiralty jurisdiction in the enforcement of an *agreement* providing exclusive rights and liabilities and the remedy for their enforcement, although by such enforcement a party was deprived of the rights and remedies that he otherwise would have had in the admiralty court. *A fortiori* it would seem that no violation would result in enforcing an *agreed* method of determining the merits of a controversy in a suit for the enforcement of contractual rights and liabilities.

The question therefore in the last analysis resolves itself into this: Does the issuance of an auxiliary process, specifically to enforce a term of the contract upon which suit is brought in a court of concurrent jurisdiction violate the exclusive jurisdiction of the admiralty, merely because in a suit on the contract in the admiralty forum a policy may be said still to exist against such specific enforcement? If the *policy* of the

Admiralty Court is to control the policy of the state forum in the application of a remedy in a cause of concurrent jurisdiction, it is a distinct change of the general rule that the policy of the forum determines in matters of remedies. It is well known that the policies of the Federal Courts and the New York courts differ in reference to the enforcement of an agreement exempting a carrier from liability for negligence. It has, however, never been suggested that in a case of concurrent jurisdiction the policy of the state would not control in its forum. Neither do we believe that this Court will find in the provisions conferring jurisdiction on the admiralty court any justification for extending a rule of policy that in the nature of things belongs peculiarly and exclusively to the forum.

POINT III.

The Court of Appeals of the State of New York erred in holding that to enforce the arbitration agreement in the State Court would "destroy a rule of uniformity."

The Court of Appeals cited as authority for the above holding the cases of *Southern Pacific Company* v. *Jensen* (*supra*) and *Knickerbocker Ice Company* v. *Stewart* (*supra*). We submit that the court has drawn from these cases an unwarranted conclusion.

We start with the conceded premise that the sole function of the statute is to furnish a remedy. A remedy in a state court for a maritime

cause however has never been condemned on the theory that it destroyed uniformity. The saving of a common-law remedy not only saved the remedies of the several states within their several jurisdictions existing at the time of the passage of the Judiciary Act (which it has never been supposed were uniform) but also, as has been pointed out, statutory remedies subsequently enacted for maritime contracts or torts, so long as they did not attempt to parallel the peculiar remedies in the admiralty established for such cases. [*Leon* v. *Galceran* (*supra*); *Knapp Stout Co.* v. *McCaffrey* (*supra*); *Rounds* v. *Cloveport Foundry* (*supra*); *Chase* v. *American Steamboat Company* (*supra*)].

The uniformity rule is directed toward statutes changing rights and liabilities definitely fixed by maritime rules.

We read in the *Jensen* and *Stewart* cases no overruling of this principle. The violation of the uniformity rule referred to in those cases resulted from the attempts made to substitute statutory *rights and liabilities* for rights and liabilities definitely fixed by the maritime law. As was said by the court in the *Knickerbocker* case at page 159 referring to its holding in the *Jensen* case:

> "Thus we distinctly approved the view that the original saving clause conferred *no substantive rights* and did not authorize the states to do so. It referred only to *remedies* and to the extent specified permitted continued enforcement by the State Court of rights and obligations founded on maritime law."

That the destruction of uniformity condemned in the *Jensen* case resulted from the attempt made by the state to legislate *rights and liabilities* into maritime matters where the subject of legislation "admits and requires uniformity of *regulation*," was specifically pointed out by this Court at page 217, as follows:

> "If New York can *subject* foreign ships coming into her ports *to such obligations as those enforced by her compensation statute* other states may do likewise. The necessary consequence would be the destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish and freedom of navigation between the states and foreign countries would be seriously hampered and impeded."

Again this Court in the recent case of *State Industrial Commission* v. *Nordenholt Corporation* (259 U. S. 263) in discussing the uniformity rule, referring to the *Jensen* case said at page 276:

> "In *Jensen's* case *rights and liabilities* were definitely fixed by *maritime rules whose uniformity was essential.* With these the *local law came into conflict.*"

Thus as we read the *Jensen* and *Stewart* cases, as well as other cases in which the uniformity rule has been applied or discussed, the statutes there considered were condemned as offending the rules because they wiped out rights secured by the maritime law or undertook to impose new liabilties and substitute new rights unknown to that law or both. Such statutes "worked ma-

terial prejudice to the characteristic features of the General Maritime Law and interfered with the proper harmony and uniformity of that law in its international and interstate relations." As was pointed out in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, at page 382:

> "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely *change or add to the settled maritime law;* and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states'."

The arbitration statute neither changes nor impairs the rights and obligations fixed by maritime rules.

The statute here under consideration, however, does not impair or change the rights or liabilities existing under the maritime law or substitute other rights or liabilities for those sanctioned by the Maritime Law. Neither does it of its own force impose a new or compulsory remedy or alter in the slightest degree the remedy available in the Admiralty Court. Instead of depriving parties of rights and remedies under the maritime law or imposing new burdens unknown to that law, it merely makes available an auxiliary remedy in the State Court for the enforcement of contractual rights. It is the agreement of

the parties, not the mandate of the statute, that brings about the relinquishment of the usual methods for determining the merits of the dispute. If parties wish the usual method for determining merits to govern, they are not compelled to contract for a different one. If they do so contract that contract can be enforced in the same manner as that in which any other contract can. We can read in no decided case of this Court any suggestion that the uniformity rule may be invoked to deprive a party of a contractual right or shield another from the performance of his contractual obligation.

We assume of course without argument that a policy that had its genesis in the ancient jealousy of the *common law courts* of their jurisdiction and that presents an anomaly in the general law of contracts cannot be said to be a "characteristic feature of the general maritime law" that must be preserved in whatever court a maritime controversy may be presented.

Remedies Regulated by lex fori.

That a similar remedy may not exist in all the states to enforce a right or redress a maritime injury has, as we have shown, never been an objection to its use. *Knapp Stout Co.* v. *McCaffrey* (*supra*) illustrates the point. It was conceded in that case that the remedy there invoked was one sanctioned *only by the local law* (page 645), but that fact was not considered objectionable.

The fact that the *admiralty court* may refuse to adopt a part of the state practice in its courts

on the ground that to do so would introduce confusion and result in a lack of uniformity in the practice in the federal forum is of course no reason for condemning the remedy sought in the state court. The admiralty court presumably may exclude much of a state court practice on that ground. The statutory remedy of a Bill of Particulars is illustrative. Although the admiralty court refuses to apply such a remedy in its forum because to do so would result in a lack of uniformity of practice (*Foster* v. *Compagnie Francaise de Navigation a Vapeur*, 219 Fed. 351), it has never been suggested that this fact would be a reason for excluding its use in a case of concurrent jurisdiction in the state court. We presume that the admiralty jurisdiction concedes as much independence to the state jurisdiction in this respect as that which it exacts for itself.

It seems to us that the state court's independence of practice in a cause of concurrent jurisdiction was definitely conceded in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. In that case the court pointed out at page 379 that the *substantive* rights under a maritime contract "must be the same *in every court*, maritime or common law," but concludes:

> "The only difference between a proceeding in the one court or the other would be that the *remedy would be regulated by the lex fori.*"

From whatever angle therefore the decision of the New York Court of Appeals may be viewed it can be supported, we contend, neither on prin-

ciple nor on precedent. And in view of the great benefit to be derived by the commercial public and the relief to be afforded to both courts and disputants resulting from the enforcement of the arbitration agreement, and in view also of the confusion and uncertainty and injustice that would obviously result from allowing the judgment of the New York court to stand, we submit that the same should be reversed.

POINT IV.

The judgment of the Supreme Court of the State of New York, New York County, entered upon the judgment and remittitur of the Court of Appeals of that State should be reversed.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for the Red Cross Line.

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
On the Brief.

APPENDIX.

CHAP. 275.

AN ACT in relation to arbitration, constituting chapter seventy-two of the consolidated laws. Became a law April 19, 1920, with the approval of the Governor.

Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

CHAPTER 72 OF THE CONSOLIDATED LAWS
ARBITRATION LAW.

Article 1. Short title (§1).

2. General provisions (§§ 2-6).

3. Application of certain sections of the code of civil procedure and repeal of certain other provisions thereof (§§7-9).

4. Time of taking effect (§10).

ARTICLE 1.

SHORT TITLE.

Section 1. Short title.

Section 1. Short title. This chapter shall be known as the "Arbitration Law."

ARTICLE 2.

General Provisions.

Section 2. Validity of arbitration agreements.

3. Remedy in case of default.

4. Provision in case of failure to name arbitrator or umpire.

5. Stay of proceedings brought in violation of an arbitration agreement or submission.

6. Applications to be heard as motions.

§ 2. VALIDITY OF ARBITRATION AGREEMENTS. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. REMEDY IN CASE OF DEFAULT. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight

days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for personal service of a summons. The court, or a judge thereof, shall hear the parties, and upon being satisfied that the making of the contract or submission or the failure to comply therewith is not in issue, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default be in issue, the court, or the judge thereof, shall proceed summarily to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. If the jury find that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury find that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court, or the judge thereof, shall make an order summarily directing the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof.

§ 4. PROVISION IN CASE OF FAILURE TO NAME ARBITRATOR OR UMPIRE. If, in the contract for arbitration or in the submission, described in section two, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court, or a judge thereof, shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

§ 5. STAY OF PROCEEDINGS BROUGHT IN VIOLATION OF AN ARBITRATION AGREEMENT OR SUBMISSION. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

§ 6. APPLICATIONS TO BE HEARD AS MOTIONS. Any application to the court, or a judge thereof, hereinunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

ARTICLE 3.

APPLICATION OF CERTAIN SECTIONS OF THE CODE OF CIVIL PROCEDURE AND REPEAL AND AMENDMENT OF CERTAIN OTHER PROVISIONS THEREOF.

Section 7. Repeal of provisions of code of civil procedure.

8. Application of certain sections of code of civil procedure.

9. Amendment of certain section of code of civil procedure.

§ 7. REPEAL OF PROVISIONS OF CODE OF CIVIL PROCEDURE. Sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five of chapter seventeen, title eight, of the code of civil procedure are hereby repealed.

§ 8. APPLICATION OF CERTAIN SECTIONS OF CODE OF CIVIL PROCEDURE. The provisions of Sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both

inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five, so far as practicable and consistent with this chapter, shall apply to an arbitration agreement under this chapter, and for such purpose the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter if no court be specified in the arbitration agreement.

§ 9. AMENDMENT OF CERTAIN SECTION OF CODE OF CIVIL PROCEDURE. Section twenty-three hundred and eighty-two of the code of civil procedure is hereby amended to read as follows:

§ 2382. Where a party dies after making a submission either as prescribed in this title or otherwise, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party to a submission is appointed, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this

section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

ARTICLE 4.

Time of Taking Effect.

Section 10. Time of taking effect.

§ 10. Time of taking effect. This act shall take effect immediately.

Chap. 14.

AN ACT to amend the arbitration law, in relation to arbitration agreements.

Became a law March 1, 1921, with the approval of the Governor.

Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section two of chapter two hundred and seventy-five of the laws of nineteen hundred and twenty, entitled "An Act in rela-

tion to arbitration, constituting chapter seventy-two of the consolidated laws," is hereby amended to read as follows:

§ 2. VALIDITY OF ARBITRATION AGREEMENTS. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, or article eighty-three of the civil practice act shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 2. Section eight of such chapter is hereby amended to read as follows:

§ 8. APPLICATION OF CERTAIN SECTIONS OF CODE OF CIVIL PROCEDURE AND THE CIVIL PRACTICE ACT. The provisions of sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five, and the corresponding sections of the civil practice act, namely sections fourteen hundred and ten to fourteen hundred and thirty-one, both inclusive, except sections fourteen hundred and twenty-eight, fourteen hundred and twenty-nine and fourteen hundred and thirty, so far as practicable and consistent with this chapter, shall

apply to an arbitration agreement under this chapter, and for such purposes the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter, if no court be specified in the arbitration agreement.

§ 3. This act shall take effect April fifteenth, nineteen hundred and twenty-one.

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The dispute between the parties herein arises out of the charter party of the steamship "Runa," which is a maritime contract. It is therefore within the admiralty and maritime jurisdiction of the United States Courts, which is exclusive, except for the reservation in the Judicial Code of common law remedies to suitors. The remedy invoked in this proceeding is purely statutory, unknown to the common law, and hence is not saved to the petitioner 4

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Supreme Court of the United States

OCTOBER TERM, 1922.

RED CROSS LINE,
Petitioner,
against
ATLANTIC FRUIT COMPANY,
Respondent.

In the Matter
of
The petition of RED CROSS LINE for an order directing ATLANTIC FRUIT COMPANY to proceed to arbitration.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner, Red Cross Line, seeks to have reviewed by means of a writ of certiorari, the decision of the Court of Appeals of the State of New York, that the Arbitration Law of New York, Chapter 275 of the Laws of 1920, does not

apply to the controversy between the parties to this proceeding.

The Arbitration Law, a copy of which appears in the appendix added to the petitioner's brief, provides in Section 2 in substance, that an arbitration stipulation in a written contract shall be valid, enforcible and irrevocable, and in Section 3 that in the event of the failure or refusal of one of the parties to the contract to carry out the arbitration agreement, the other party may petition the Supreme Court or a Judge thereof for an order directing that such arbitration proceed in the manner provided for in the agreement.

On April 13, 1921, counsel for the petitioner served upon the Atlantic Fruit Company a verified petition to which was attached a notice that a motion would be made at Special Term, Part I of the Supreme Court of New York County, on April 21, 1921, for an order directing Atlantic Fruit Company to proceed to the arbitration of the petitioner's claim as set forth in the petition, pursuant to Chapter 275 of the Laws of 1920 (Record, fols. 10-12).

The averments of the original petition are set out in Article 3 of the petition herein with sufficient fullness to make their repetition unnecessary by the respondent.

In addition to filing a formal answer to the petition (Record, fols. 75-99), the Atlantic Fruit Company submitted affidavits in opposition to the motion of the Red Cross Line (Record, fols. 100-111). The contention made by Atlantic Fruit Company was that the real dispute between the parties was of a maritime nature, having arisen out of a charter party, and hence the Arbitration Law of New

York, in providing a new remedy for the enforcement of arbitration agreements, did not apply, but that if it was intended to apply to and govern such a dispute as the one between these parties, it was contrary to the Constitution of the United States, Article III, Section 2, and to Section 24 of the Judicial Code of the United States, Subdivision Third, and to Section 256 of the Judicial Code of the United States, Subdivision Third.

The New York Supreme Court, New York County, after a hearing at a Special Term, Part I, granted the petition of Red Cross Line (Record, fols. 4-9), which order was later affirmed without opinion by the Appellate Division of the New York Supreme Court (Record, fols. 219-222). On appeal by Atlantic Fruit Company, however, to the Court of Appeals of New York, that Court unanimously reversed the order on the ground that the subject of the controversy between the parties was within the admiralty and maritime jurisdiction of the United States Courts, and that therefore the remedy provided by the Arbitration Law, which was a statutory legal remedy unknown to the common law, was not within the saving clause of the Judicial Code, Section 24, Subdivision Third. It was accordingly held that an intention could not be attributed to the Legislature of the State of New York to limit or usurp the jurisdiction of the Federal Courts. The Court of Appeals also held that to apply the remedy provided by the Arbitration Statute would be to impair the rule of uniformity in the application of the admiralty law in the United States. The decision of the Court of Appeals is reported in 233 N. Y., 373 (*Matter of Red Cross Line* v. *Atlantic Fruit Com-*

pany), and is printed in the record herein (Record, fols. 265-291).

It is respectfully submitted that the petition should be denied for the following reasons:

1. The dispute between the parties herein arises out of the charter party of the steamship "Runa," which is a maritime contract. It is therefore within the admiralty and maritime jurisdiction of the United States Courts, which is exclusive, except for the reservation in the Judicial Code of common law remedies to suitors. The remedy invoked in this proceeding is purely statutory, unknown to the common law, and hence is not saved to the petitioner.

Section II of Article III of the Constitution of the United States provides in part as follows:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Judicial Code, Section 24, U. S. Comp. Stat., Sec. 991, Subdivision Third, provides as follows:

> "The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of common law remedy where the common law is competent to give it."

Section 256 of the Judicial Code, U. S. Comp. Stat., Section 1233, Subdivision Third, provides as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States; * * *
>
> Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

The saving clause of the Judicial Code refers on its face to remedies, and this has been construed to mean common-law remedies and not remedies in common law courts.

See:

> *The Moses Taylor,* 4 Wallace, 411 at page 431.

The New York Court of Appeals in *Matter of Berkovitz* v. *Arbib & Houlberg* and *Spiritusfabriek Astra of Amsterdam Holland* v. *Sugar Products Company,* 230 N. Y., 261, held that the Arbitration Law created a new remedy, stating as follows at page 270:

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * *. The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure

> whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The Court further stated, at page 272:

> "Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one."

The Court of Appeals in the present case (233 N. Y., 373), reiterated in substance what it had previously stated in *Matter of Berkovitz* v. *Arbib & Houlberg, supra,* at page 381:

> "The section of the Arbitration Law (Section 3), under which the order herein was granted, has been construed by us as a statutory legal remedy of a character unknown to the common law (*Matter of Berkovitz* v. *Arbib & Houlberg,* 230 N. Y., 261). It therefore is not embraced within the exceptions contained in the Judicial Code."

A charter-party of a vessel is a maritime contract and disputes arising out of it are within the admiralty and maritime jurisdiction of the United States Courts.

In *Morewood et al.* v. *Enequist,* 23 Howard, 491, this Court, discussing the nature of a charter party

and referring to its previous decision in *New Jersey Steamboat Company* v. *The Merchants' Bank of Boston* (6 How., 334), stated at page 493:

> "The whole subject was most thoroughly investigated both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day—everything which the industry, learning, and research, of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either in rem or in personam."

See also:

> *Metropolitan S. S. Co.* v. *Pacific Alaska Nav. Co.*, 260 Fed., 973;
> *Dunbar* v. *Weston*, 93 Fed., 472.

This Court in *Southern Pacific Company* v. *Jensen*, 244 U. S., 205, decided that the Workmen's Compensation Act of New York provided a *remedy* and was unconstitutional insofar as such remedy was intended to apply to matters of a maritime nature.

It was stated at page 218 as follows:

> "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any

court and is not saved to suitors from the grant of exclusive jurisdiction."

In *Knickerbocker Ice Company* v. *Stewart,* 253 U. S., 149, the Court stated at page 158:

> "We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary process of any court."

In *The Hine* v. *Trevor,* 4 Wall., 555, this Court, referring to the saving clause in the ninth Section of the Judiciary Act, the same one now under consideration, stated at page 571:

> "But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated."

See also:

Brookman v. *Hamill,* 43 N. Y., 554;
The Lottawanna, 21 Wallace, 558;
The J. E. Rumble, 148 U. S., 113;
Union Fish Company v. *Erickson,* 248 U. S., 308.

It is settled, therefore, by the cases quoted, that a remedy applicable to cases within the admiralty and maritime jurisdiction of the United States courts must, in order to come within the permission of the Judicial Code, be a common-law remedy, which the common-law is competent to give, and not a statutory remedy.

2. The decision of the Court of Appeals is in complete harmony with the decisions of this Court.

The Court of Appeals discerned at once that the real fundamental dispute between the parties was whether or not the Red Cross Line was entitled to reimbursement for alleged overpaid charter hire and disbursements made by it when the "Runa" was claimed to be off hire. It recognized that the petitioner, regardless of what was said by its counsel, wished the settlement of the controversy through the machinery provided by the Arbitration Law. Having found that this law created a new statutory remedy unknown to the common law, its only course was to declare the remedy inapplicable to the dispute in hand under the authority of the decisions of this Court in *Southern Pacific Company* v. *Jensen*, and *Knickerbocker Ice Company* v. *Stewart, supra.*

It is not true that the Court of Appeals decided that under all circumstances the jurisdiction of the United States Courts over a controversy such as the present one would be exclusive. It had well in mind the saving clause contained in Section 24 of the Judicial Code, for the opinion begins with a reference to that very clause. It is, therefore, un-

fair to lift any portion of the opinion bodily from its context and then argue that the decision of the Court of Appeals was erroneous on the subject of jurisdiction. A reading of the opinion in its entirety will disclose no confusion on the part of the Court of Appeals on the subject of Federal and State jurisdiction over maritime disputes.

Reply to the Argument of the Petitioner.

We shall endeavor to answer as briefly as possible the arguments advanced by the petitioner. First, it is contended that the agreement to arbitrate, stated to be the subject of the remedy, is not a maritime covenant, and hence is not a matter of admiralty and maritime cognizance. It is said that a charter party is a bundle of covenants, maritime and non-maritime, and that the arbitration agreement falls within the latter class.

Our answers are: (1) that the arbitration stipulation is maritime and that it has been so held; (2) it is maritime, because its subject matter, *particularly considering the matters in dispute, already specified, which have arisen*, is maritime; and (3) the enforcement of the arbitration covenant is not the end sought, but by the aid of the Arbitration Statute, the means to the end.

In *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed., 787, affirmed by the Circuit Court of Appeals for the Second Circuit in 102 Fed., 926, jurisdiction was taken by an admiralty court of an action to recover damages for a breach of an agreement to arbitrate matters in dispute under a charter party. The Court sustained exceptions to the libel

on the ground that the subject of damages on the breach of an arbitration agreement was one too remote to be made the basis of an action. Neither the Circuit Court of Appeals nor the District Court expressed any doubt as to the jurisdiction of the admiralty court over such a case, or questioned the maritime nature of the stipulation.

Moreover, in determining whether an agreement is maritime or not, its subject matter rather than the mere agreement itself is what controls. It is true that this arbitration agreement was made on land and would be performed on land. Nevertheless it is an agreement with reference to maritime disputes.

In *North Pacific Steamship Company* v. *Hall Brothers Marine Railway & Shipbuilding Company*, 249 U. S., 119, this Court on the subject of admiralty jurisdiction in matters of contract, stated at page 125:

> "It must be taken to be the settled law of this Court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—in matter of contract it depends upon the subject-matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transaction."

See also:

Baltimore Steam-Packet Co. v. *Paterson*, 106 Fed Rep., 736;
Graham v. *Oregon R. & Navigation Co.*, 135 Fed., 608.

The petitioner on page 18 of its brief refers to the case of *The Ada*, 250 Fed., 194, where the District Court had under consideration a charter party containing covenants to purchase the captain's chronometer and the steamer's ice-box and held that they were not maritime. Such covenants, however, are very different from one to arbitrate disputes arising out of a maritime contract.

The petitioner also refers on the same page to the case of *Pacific Surety Company* v. *Leatham & Smith Towing & Wrecking Company*, 151 Fed., 440 where the Court held that a bond securing the performance of a charter party was not a maritime obligation. The admiralty court refused to take jurisdiction because the respondent executing the bond was not a party to the original maritime contract. That case is entirely different from the one now before this Court for the reason that here both the petitioner and respondent were parties to the martime contract and the covenant sought to be enforced is a component part of the agreement.

As matters stood when the Red Cross Line made its demand for arbitration and filed its petition, *the matters in dispute*, to settle which the arbitration stipulation was invoked, were maritime in nature.

In view of the decisions of this Court holding that the subject matter is what determines the question of admiralty jurisdiction in matters of

contract, it is needless to argue further whether the arbitration clause standing alone is or is not a maritime covenant, because here its subject matter is a maritime dispute, which clearly comes within the admiralty and maritime jurisdiction, except where a common law remedy is saved.

Counsel for the petitioner continually insists that *arbitration,* and not the differences arising between the parties out of the voyage of the steamship "Runa," is the subject of the remedy relied upon. This contention is absolutely unsound. The arbitration covenant is not the subject of the remedy but, by virtue of the Statute, is the remedy itself. The Arbitration Statute and the covenant *together* create the remedy. Each is impotent without the other. The Court of Appeals completely demolished this argument and the statement of petitioner's counsel on page 19 that the Court did not deny the soundness of this contention is disingenuous, to say the least.

It is further urged that the Arbitration Statute creates no new remedy but merely makes available the old equity remedy by way of specific performance. It is also stated on page 29 of the petitioner's brief that arbitration was an ancient common law method of enforcing rights and redressing wrongs. Nothing could be further from the truth.

The arbitration clause in question appears in Article Sixth of the petition of the Red Cross Line (Record, fols. 21, 22). There never was a time when the performance of an arbitration clause such as this was specifically enforced by a court of equity or any other court. Arbitration clauses drawn in this form were unenforcible in Federal and State courts alike. The only recourse of an aggrieved party was an action for damages for refusal to arbitrate.

In *U. S. Asphalt R. Co.* v. *Trinidad Lake P. Co.*, 222 Fed. Rep., 1006, Judge Hough had under consideration an arbitration clause practically identical with the present one. The Court reviewed the authorities on arbitration agreements at great length, and stated as follows at page 1012:

> "I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter-parties is void in a Federal forum."

See also:

> *Insurance Co.* v. *Morse,* 20 Wall., 457.
> *Doyle* v. *Insurance Co.,* 94 U. S., 535.
> *Meacham* v. *Jamestown & Co.,* 211 N. Y., 346.

Needless to say, if the courts of the State of New York had, previous to 1920, afforded to suitors a remedy for enforcing the specific performance of arbitration covenants, the enactment of the Arbitration Law by the New York State Legislature would have been an idle and useless proceeding. The Court of Appeals has rightly held that the statute creates an entirely new remedy.

On page 23 of its brief the petitioner alludes to the case of *Steamboat Company* v. *Chase,* 16 Wall., 522. There was no remedy whatever given in the admiralty court for loss of life resulting from a collision, and it was consequently held by the Supreme Court that the State courts were at liberty to exercise jurisdiction in actions not cognizable in the admiralty courts, just as if such courts were

unknown to the Constitution. The case has no bearing upon the present one, however, because the admiralty courts have always taken jurisdiction of disputes arising out of charter parties.

It is further urged that the Arbitration Statute is unobjectionable because the proceedings it contemplates are not *in rem* but *in personam* and that in any event the rule of uniformity in the application of the admiralty law is not affected.

There is no basis for the argument that the Judicial Code saves to suitors all remedies in the common law courts, as long as they are remedies *in personam* and not *in rem*. It happens that many of the State statutes declared invalid by this Court did provide for purely *in rem* proceedings. The rule, however, is much broader than that and it is settled that any State legislation on maritime matters, which tends to impair the uniformity so essential in the general application of admiralty law throughout the several States, is improper. Consider the cases of *Southern Pacific Company* v. *Jensen* and *Knickerbocker Ice Company* v. *Stewart, supra*. In the former case, the statute did not provide a remedy *in rem* and yet it was held unconstitutional.

This Court, after referring to the appropriate articles of the Constitution, stated at page 216:

> "In view of these constitutional provisions and the Federal Act, it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for

repairs in her own port may be given by state statute * * * and the right given to recover in death cases * * *. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty * * * nor create liens for materials used in repairing a foreign ship. * * * And plainly, we think, no such legislation is valid if it contravenes the essental purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna."

The Court also stated at page 217:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

In *Knickerbocker Ice Company* v. *Stewart, supra,* where the amendment to Section 24 of the Judicial Code reserving to claimants rights and remedies under the Workmen's Compensation Law of any State was considered and held unauthorized, this Court stated at page 164:

> "And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."
>
> "Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodied both the will and deliberate judgment of Congress. The subject was entrusted to it to be dealt with according to its discretion—not for delegation to others."

And again at page 166:

> "Obviously if every State may freely declare the rights and liabilities incident to maritime

employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

It will also be noted that in *Union Fish Company* v. *Erickson, supra,* and *Chelentis* v. *Luckenbach Steamship Company, Incorporated,* 247 U. S., 372, no questions of remedies *in rem* were before this Court.

In *Watts* v. *Camors,* 115 U. S., 353 (6 Supreme Court Reporter, 91), the Supreme Court of the United States had under consideration a charter party which contained a clause binding the parties to the true performance of the agreement in the penal sum of the estimated amount of freight. The Civil Code of Louisiana had been pleaded on the question of the stipulated damages.

The Court disregarded the Louisiana Statute and stated as follows at page 95.

> "But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy. If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that contract is to be regulated by the law which they must be presumed to have had in view when they executed it. * * * Americans and Englishmen, entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state

in which the contract was signed. If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states. *U. S.* v. *Howland*, 4 Wheat., 108; *Livingston* v. *Story*, 9 Pet., 632; *Russel* v. *Southard*, 12 How., 139; *Neves* v. *Scott*, 13 How., 268; *The Chusan*, 2 Story, 455; *The St. Lawrence*, 1 Back., 522; *The Lottawanna*, 21 Wall., 558; Rev. St., Sections 913, 914. The Circuit Court, therefore, rightly held that the charterers were liable only for the amount of damages which their breach of the contract had actually caused to the owner of the ship."

The case of *Grant Smith-Porter Ship Co.* v. *Rhode*, 42 Sup. Ct. Rep., 157, cited on page 28, and that of *State Industrial Commission* v. *Nordenholt Corporation et al.*, 42 Sup. Ct. Rep., 157, cited on page 42, of the petitioner's brief do not conflict in any way with the authorities relied upon by the respondent.

In the first case this Court held that the general employment of the libellant Rhode had no direct relation to navigation or commerce. The case was distinguished from *Southern Pacific Company* v. *Jensen, supra*, and the Court stated that the application of the local law, being the Oregon Workmen's Compensation Law, could not materially affect any rules of the sea whose uniformity is essential.

In the second case this Court decided that the New York Workmen's Compensation Act applied to the case of a deceased longshoreman, killed while he was working on the dock, because the general maritime law did not govern, under the circumstances.

The case of *Western Fuel Co.* v. *Garcia*, 42 Sup. Ct. Rep., 89 referred to in the *Grant Smith-Porter* case simply held that where a State Statute allowed an action for damages for death due to a wrongful act, the administrator could bring a suit in the admiralty court under the statute, where the deceased was killed in the hold of a vessel lying in navigable waters.

The Court, referring to the case of *Southern Pacific Company* v. *Jensen, supra*, stated at page 90:

> "And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts wherever suit may be instituted."

The result of overturning the decision of the New York Court of Appeals in this case and holding that the remedy created by the Arbitration Law is within the saving clause of the Judicial Code would be a serious impairment of the uniformity in the application of the maritime law.

Consider briefly the subject of the present dispute. The petitioner claims that it is entitled to reimbursement for certain charter hire which it alleges that it paid to the respondent under protest on the charter of the steamship "Runa" and

for certain disbursements which it made while, as it claims, the "Runa" was off hire. Its contentions are that there was a breach of the charter party because the master is alleged not to have prosecuted the voyage with the utmost despatch, resulting in a delayed departure of the "Runa" from New York, so that she ran into a heavy storm which she would not otherwise have encountered; that there was a deficiency of stores resulting in the vessel being off hire for a certain length of time; that there was an unjustified deviation to the Azores and that the master took on an excess supply of coal at the Azores before the voyage back to St. John's, Newfoundland. One of the main questions to be decided in the case is whether the storm encountered by the "Runa" on her trip to St. John's, Newfoundland, was of such an unusual degree of severity as to necessitate her running before the wind into the Azores. The question will also arise as to who was responsible for the deficiency in the coal supply and to what extent if any such deficiency contributed to the difficulties experienced by the "Runa" in the storm.

If the remedy for the specific enforcement of the arbitration clause, provided by the Arbitration Law, is held applicable, the decision of the maritime questions necessary to a correct solution of the dispute will be placed in the hands of arbitrators.

The Arbitration Law, be it remembered, does not make the finding of the arbitrators a preliminary to some further hearing which might take place in a court, but the finding of the arbitrators is final and conclusive on the merits and their award cannot be vacated except on proof of fraud, corruption or other misconduct.

The Arbitration Law incorporates Sections 2365 to 2382 of the old New York Code of Civil Procedure. Section 2373 provides for the confirmation of the award of the arbitrators by the Court, and Section 2378 and the following sections provide for the entry of judgment upon the order of confirmation in the same manner as upon a referee's report in an action, and for the docketing of the judgment entered upon the award and the issuance of an execution thereon. The Code provides that after a judgment is entered on the award and docketed, it shall have the same force and effect as a judgment in any other action, and an appeal can be taken from it in the same manner as from any other judgmet. (The subject of arbitration is now covered by Sections 1448 to 1469 of the Civil Practice Act of New York.)

Once the proceeding has started, therefore, it goes through to a final conclusion. The rights and liabilities of the parties are determined by arbitrators, business men in the vast majority of cases, ignorant of the admiralty law and bound by no legal precedent.

If it is proper for New York to pass a statute of this nature, broad enough to afford suitors a new remedy in maritime disputes, what is there to prevent other States from passing similar or widely different statutes with the same object? Instead of having maritime disputes between parties decided according to the rules of the sea, for those rules would be applicable either in a common law or an admiralty court (*Chelentis* v. *Luckenbach Steamship Company, Incorporated, supra*), they would be decided by groups of individuals here and there who would make their own rules, without re-

gard to, or perhaps more truthfully, in ignorance of, the maritime law.

The danger of holding the remedy given by the Arbitration Law to be within the saving clause of the Judicial Code is apparent. A due regard for uniformity in the maritime law will, we feel certain, lead this Court to deny the petitioner's application.

It is perhaps worthy of note, in conclusion, that the respondent in this proceeding filed a libel in the United States District Court for the Southern District of New York on June 4, 1920, for the recovery of $4,518.99, balance of charter hire on the "Runa" for the particular voyage under consideration. The petitioner herein appeared in that action and filed an answer pleading the payment of $35,256.96 under protest. It also set up in paragraph seventeenth of its answer, a separate defense to the effect that it had made a demand on the Atlantic Fruit Company for arbitration pursuant to the New York Arbitration Law, and that the Atlantic Fruit Company had refused to arbitrate. The Atlantic Fruit Company filed exceptions to this defense as insufficient, and at the same time the Red Cross Line made a motion for a stay of the admiralty action pending the determination of the arbitration proceedings. Both motions were heard by Circuit Judge Julian W. Mack at the same time.

Judge Mack denied the motion of the Red Cross Line for a stay, and sustained the exceptions of the Atlantic Fruit Company to the defense based upon the Arbitration Law. The opinion is reported in 276 Fed., 319. (*Atlantic Fruit Co.* v. *Red Cross Line.*)

The petition for writ of certiorari should be denied.

Dated, New York, September 26, 1922.

Respectfully submitted,

JOHN W. CRANDALL,
Counsel for Respondent.

JOHN W. CRANDALL,
E. F. RAPALLO,
of Counsel.

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